SUPREME COURT, U. S.
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No. 73-214

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

CHRIS CARDI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
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No.

UNITED STATES OF AMERICA,

Respondent,

vs.

CHRIS CARDI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Chris Cardi, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ..... F.2d ..... This opinion is printed in the appendix (A. 1) to this petition. The opinion of the United States District Court for the Northern District of Illinois is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 16, 1973. A timely petition for rehearing was denied on July 2, 1973. This petition was filed within 30 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Seventh Circuit decision violates the rule established by this Court in *Lutwak* v. *United States,* 344 U.S. 604 (1953), by allowing a hearsay declaration of a co-conspirator to be used as evidence against petitioner even though the declaration occurred, as the Court of Appeals found, two months after petitioner's participation in the conspiracy ended.

2. Whether this case should be remanded for resentencing under the rule set forth in *United States* v. *Tucker,* 404 U.S. 443 (1972) on the grounds that the sentencing court improperly considered, in fixing the length of the sentence, evidence admitted against petitioner in violation of the Sixth Amendment and the fact of conviction on two counts which were subsequently reversed for insufficient evidence.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The questions presented by this petition, which involve the admission of hearsay testimony and sentencing in a federal prosecution, also invoke the supervisory power of this Court.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit, affirming a jury verdict of guilty on four of seven counts of an indictment for conspiring to and selling narcotics in violation of 26 U.S.C. § 4705(a) and 21 U.S.C. § 174. Petitioner was found guilty under section 174 of conspiring to and making sales of narcotics on September 25, October 1, and October 15, 1970. Petitioner was acquitted of similar charges under section 4705(a). Evidence admitted against petitioner included a taped telephone conversation between a paid government informer and a co-defendant which occurred on November 28, 1970. On appeal, the Seventh Circuit reversed petitioner's convictions for the sales of October 1 and October 15, 1970. The appellate court found that "the conspiracy, so far as Cardi was concerned, ended [on September 25, 1970]." (A. 14).

The seven count indictment in this case charged petitioner, Virgil Cimmino and Frank Micelli with conspiracy and sales of narcotic drugs. Micelli was acquitted on all counts; Cimmino was convicted on all counts;* petitioner was convicted on counts 1, 3, 5 and 7. Petitioner is presently incarcerated in Terre Haute Federal Penitentiary, Terre Haute, Indiana. His scheduled release date is October 29, 1981.

The evidence at trial showed that Paul Moore, a paid government informer, solicited Cimmino to engage in the sale of narcotics. On September 23, Cimmino sold Moore and Weinstein, an undercover federal agent, a bag of flour

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* Cimmino has filed a petition for certiorari which is docketed in this Court as No. 72-6972.

for $4,400. There was no evidence that petitioner knew of or was involved in any way with this transaction.

After discovering that the substance they purchased was flour, Moore and Weinstein began to search for Cimmino. On September 24, Moore and Weinstein went to petitioner's house in an attempt to find Cimmino. Both Moore and Weinstein testified to the following conversation which was the only conversation that any government witness claimed to have had with petitioner. (R. 64-65) *

> "Dickie, I want to talk to you about Virgil," called Moore.
>
> "Sure, what is it?" said Mr. Cardi.
>
> "Well, you know we are doing business with him buying stuff," said Moore.
>
> "Stuff?" asked Mr. Cardi.
>
> Moore said, "Yes, heroin. He burned us. He gave us four ounces of flour or something and took $4,400 last night for it."
>
> Mr. Cardi said, "If it was anybody but you,** I wouldn't talk to you about the stuff. But I will check into it and do whatever can be done."
>
> Moore said, "Thanks, I really need the stuff."
>
> Cardi said, "You'll get it."

Petitioner's purported statement that "you'll get it" was *not* included in either Moore's or Weinstein's statements written shortly after the conversation. (R. 767). Notwithstanding the omission of these essential words in their reports which were produced by the government pursuant to 18 U.S.C. § 3500, both witnesses purported to recall the statement at trial.

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* "R." refers to petitioner's appendix filed in the Seventh Circuit and made a part of the record herein.

** Moore had testified that he knew Mr. Cardi socially. (R. 43)

On September 24, Moore testified that he received a phone call from Cimmino. Cimmino said, "you're going to get your stuff. Dickie [Cardi's nickname] is on my back." (A. 11) A meeting was set up among Cimmino, Moore and Weinstein. On September 25, 1970, Cimmino delivered heroin to Moore and Weinstein.

Cimmino's testimony contradicted the testimony of Moore and Weinstein. Cimmino claimed that Moore threatened to kill him unless he delivered the heroin. Cimmino's testimony exculpated petitioner in all respects.

In November 28, 1970, Cimmino and Moore had a lengthy telephone conversation which Moore taped. Moore testified to the substance of this conversation. In addition, the tape recording was played for the jury and a transcript of it was given to each juror to read as the tape was played. A transcript of this conversation is included in the appendix filed in the Seventh Circuit Court of Appeals (R. 727-766). Portions of the conversation are set forth in the decision of the Court of Appeals. (A. 4-6).

Through government witnesses, it was established that petitioner was not present during any of the three sales; that no narcotics were ever found in petitioner's possession; that none of the listed money used by the government agents was ever found in petitioner's possession; and that petitioner was not the source of the narcotics.

On appeal, petitioner argued that the evidence was insufficient to sustain his conviction on all counts. The Court of Appeals reversed counts 5 and 7 finding that there was "no evidence that Cardi even had knowledge of these sales." (A. 14). Although the court affirmed the conspiracy count and the count charging the sale on Septem-

ber 25, the court held that the conspiracy ended "so far as Cardi was concerned" at that time [September 25]. (A. 14).

The district court sentenced petitioner to five years in prison on the conspiracy count and five years on each of the three sales counts to run concurrent with each other but consecutive to the five years on the conspiracy count. During the sentencing hearing, the government argued that the taped telephone conversation demonstrated petitioner's involvement in the entire course of conduct. (A. 18) The trial court found explicitly that petitioner was the focal point of all the criminal activity charged in the indictment; that none of the sales could have occurred without petitioner; and, that petitioner was more involved in the criminal activity than any other defendant. (A. 19).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Seventh Circuit's decision in this case is directly contrary to the holdings in *United States* v. *Lutwak*, 334 U.S. 604 (1953) and *Krulewitch* v. *United States*, 336 U.S. 440 (1949). The evidence clearly shows that the taped telephone conversation occurred long after petitioner's miniscule role in the conspiracy ended. The taped telephone conversation was submitted to the jury three separate times. The conversation is replete with hearsay references to petitioner gratuitously and suggestively supplied by the paid government informer, Moore.

In light of the circumstances of this case, the error in admitting the taped telephone conversation against petitioner without limiting instructions was prejudicial. This was an extremely close case. The evidence against petitioner consisted entirely of his alleged statement, "you'll get it," (which was suspiciously absent from the agents' 3500 statements), co-defendant Cimmino's hearsay statement, "Dickie is on my back," and Cimmino's delivery of heroin on September 25, 1970. The jury demonstrably gave effect to the taped telephone conversation by convicting petitioner on counts 5 and 7, counts on which the Court of Appeals found and the record demonstrates there was absolutely no evidence against petitioner. Finally, since petitioner did not take the stand and no physical evidence was introduced against him, petitioner's conviction rested entirely upon the credibility of the two government agents. The effect of the taped telephone conversation was to cause the jury to give more credence to the agents' testimony than if the conversation had not been admitted or if the jury had been instructed not to consider the conversation against petitioner.

The trial court also considered the taped telephone conversation against petitioner in fixing petitioner's sentence. Although that conversation was admitted against petitioner in violation of his sixth amendment right and in violation of the rules of evidence established by this Court in federal conspiracy cases, the trial court nevertheless considered it. Additionally, the trial court was influenced by the jury's guilty verdicts on counts 5 and 7. Convictions on these two counts were reversed by the Court of Appeals not for insufficient evidence, but rather for *no* evidence whatsoever. The trial court's consideration of these two factors violates the rule of *United States* v. *Tucker*, 404 U.S. 443 (1972). The Court of Appeals has denied petitioner's request that he be resentenced.

I.

THE COURT OF APPEALS IMPROPERLY REFUSED TO FOLLOW THIS COURT'S RULE SET FORTH IN LUTWAK v. UNITED STATES AND KRULEWITCH v. UNITED STATES

Petitioner argued in the Seventh Circuit that the evidence was insufficient to show that petitioner participated in a conspiracy. In the alternative, petitioner argued that the conspiracy ended on October 15, 1970 when the central objective of the conspiracy was achieved. Petitioner pointed out that the taped telephone conversation was admitted over objection and without limiting instructions even though it took place on November 28, 1970. Petitioner argued, on the authority of *Lutwak* and *Krulewitch*, that the conviction as to all counts must be reversed and remanded for a new trial. The Seventh Circuit held that petitioner's participation in the conspiracy ended on September 25, 1970. The opinion of the court is silent as to

the error occasioned by the admission of the taped telephone conversation.*

The rule of *Lutwak* and *Krulewitch* is clear. Relevant post-conspiracy declarations of co-defendant Cimmino were admissible against Cimmino, as the declarant, to prove his part in the crime charged. However, since petitioner's participation in the conspiracy had ended, these post-conspiracy declarations were inadmissible as to him.

In *Lutwak* v. *United States*, 344 U.S. 604, 618 (1953), this Court stated:

> "Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein. *The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only.* Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch* [336 U.S. 440 (1949)]. Such declaration is inadmissible as to all but the declarant." (Emphasis added.)

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* In his petition for rehearing, petitioner again argued this point to the Court of Appeals. The Court ordered the government to answer that part of the petition for rehearing. The government's answer fails completely in its attempt to distinguish *Lutwak*. In fact, the answer admits error and demonstrates a failure on the government's part to comprehend the *Lutwak* rule. At page 2 of its answer, the government states: "Since Cardi's participation in the conspiracy insofar as the September 25 sale was concerned was established by his own words and actions, the Cimmino-Moore conversation was properly admissible against Cardi as further evidence of that conspiracy."

Accord: *Krulewitch* v. *United States,* 336 U.S. 440, 442 (1949): *Fiswick* v. *United States,* 329 U.S. 211, 217 (1946); *United States* v. *Birnbaum,* 337 F.2d 490, 495-96 (2d Cir. 1964) (alternate holding); *Abbate* v. *United States,* 247 F.2d 410, 413 (5th Cir. 1957) (reversing as to two defendants even though limiting instructions were given), *aff'd.,* 359 U.S. 187 (1959) (as to remaining defendants).

In *Lutwak,* this Court said that declarations of a conspirator "can be used against the co-conspirator only when made in furtherance of the conspiracy. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended." (344 U.S. at 617-18).

The trial court disregarded the rule in *Lutwak,* refused to direct a verdict of acquittal for petitioner on the sales subsequent to September 25, 1970, and refused to instruct the jury to disregard the taped telephone conversation as to petitioner. The Court of Appeals reversed the convictions on the sales subsequent to September 25, 1970 and found that petitioner's participation in the conspiracy ended as of September 25, 1970, but, without explanation, refused to follow the rule in *Lutwak.* If the decision of the Court of Appeals in this case stands unreviewed, petitioner will stand convicted in contravention of the rules of evidence established by this Court and of the Sixth Amendment to the United States Constitution.

II.

THE ADMISSION OF THE TAPED TELEPHONE CONVERSATION WAS NOT HARMLESS ERROR

This is not a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure. The

error in the admission of the taped telephone conversation was extremely prejudicial for the reasons set forth below.

1. The government's case against petitioner was incredibly weak. Evidence of petitioner's own words and actions consisted entirely of the statement attributed to him by Moore and Weinstein—"you'll get it." The severe impeachment inherent in the failure of both Moore and Weinstein to include these words in their reports written shortly after the incident rendered the government's case even weaker. "A failure to assert a fact, when it would have been natural to assert it, amounts in effect to the nonexistence of the fact." IIIA Wigmore on Evidence § 1042 (Chadbourn ed. 1970). See also McCormick on Evidence §34 (2d ed. 1972); Proposed Federal Rules of Evidence § 803 (7), 56 F.R.D. 194, 301.

The hearsay evidence admitted against petitioner consisted of the taped telephone conversation and Cimmino's alleged statement to Moore on September 24 that "Dickie is on my back."

2. The taped telephone conversation contains repeated references to "D.C." and "Dickie". The references to petitioner were almost universally provided by government informer, Moore. More importantly, however, the conversation served improperly to corroborate Moore's and Weinstein's testimony. During the conversation, reference was made to names, places, and events which had previously been testified to by both of the agents. The effect of the conversation was to cause the jury to give more credence to the agents' testimony, including the testimony that petitioner said "you'll get it", by corroborating testimony they had previously given. Under similar circumstances, the Court of Appeals for the District of Columbia has reversed convictions even though limiting instructions were

given. See *Laughlin* v. *United States,* 344 F.2d 187, 192-93 (D.C. Cir. 1965).

3. The harmless error test was stated by this Court to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. 85, 86-7 (1963). See also *Chapman* v. *California,* 386 U.S. 18, 23-4 (1967); *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946).

In petitioner's case, there can be no doubt but that the taped telephone conversation contributed to his conviction. The conversation had a demonstrable effect on the jury. Despite the fact that the Court of Appeals found and the record demonstrates that there was no evidence whatsoever implicating petitioner in the sales of October 1 and 15, the jury nevertheless found petitioner guilty of those sales. The only evidence from which petitioner's complicity in those sales could possibly have been inferred is the taped telephone conversation of November 28. Although a close reading of the conversation demonstrates that this is a totally unwarranted inference, the fact remains that the jury drew it. If the jury was prepared to infer petitioner's participation in the sales of October 1 and 15 from the November 28 conversation, nothing prevented the jury from using it to infer petitioner's complicity in the offenses charged in counts 1 and 3.

The prejudicial effect of the conversation is further demonstrated by the fact that the trial court also drew inferences from the conversation. At the close of the government's case and at the close of all the evidence, petitioner moved for a directed verdict on counts 5 and 7 [the October 1 and 15 sales counts]. These motions were denied, assumedly on the strength of the taped telephone conversation since there was absolutely no other evidence against petitioner relating to these sales.

The trial court's erroneous refusal, upon the urging of the government, to direct verdicts on counts 5 and 7 forced the jury to consider the taped telephone conversation on all counts.

The government introduced the taped telephone conversation at trial against all defendants over their objections and intended the evidence to be considered by the jury as to all counts as demonstrated by the instructions tendered to the trial judge by the government. Under the circumstances of this case, there is more than a reasonable possibility that the taped telephone conversation contributed to petitioner's convictions on counts 1 and 3.

III.

PETITIONER WAS SENTENCED IN VIOLATION OF UNITED STATES v. TUCKER

In *United States* v. *Tucker*, 404 U.S. 443 (1972), this Court held that prior convictions obtained in violation of a person's sixth amendment right to counsel could not be considered by a sentencing court in determining a proper sentence. It is clear from the record in this case that the district judge's sentence was strongly influenced by the taped telephone conversation which was admitted against petitioner in violation of his sixth amendment right to confrontation and in violation of settled rules of evidence. (A. 18-9).

Petitioner recognizes the broad discretion lodged in the sentencing judge to impose sentence within the statutory limits. Appellate courts have generally refrained from reviewing this discretion. However, appellate courts have consistently reviewed the information considered by the trial court in fixing the sentence. Where the record shows

consideration of constitutionally inadmissible evidence, the sentence will be vacated and remanded for resentencing. See, e.g., *Verdugo* v. *United States,* 402 F.2d 599, 611 (9th Cir. 1968), *cert. den.,* 397 U.S. 925 (1970) (consideration of evidence seized in violation of fourth amendment). See also *Armpriester* v. *United States,* 256 F.2d 294, 297 (4th Cir. 1958) (consideration of confession obtained in violation of F.R.Cr.P. 5(a); *United States* v. *Picard,* 464 F.2d 215, 220 (1st Cir. 1972) (failure of district court to disclose what portions of presentence report court relied on where report contained unverified statements connecting defendant with serious criminal activity).

Additionally, the record demonstrates that the district judge was influenced by the fact that the jury convicted petitioner on each of the sales counts. At the sentencing hearing, the district judge stated in essence that petitioner was the "focal" point of the entire course of criminal conduct. (A. 19). The Court of Appeals has reversed petitioner's convictions on counts 5 and 7 finding that there was absolutely no evidence showing that petitioner "even had knowledge of these sales." (A. 14).

This case should be remanded for resentencing with the sentencing judge instructed to disregard the taped telephone conversation and the jury verdicts on counts 5 and 7. Even though the sentences run concurrent with the sentence on Count 3, it cannot be said that the "impermissible convictions" did not influence the sentences on the permissible convictions. *United States* v. *Parker,* 442 F.2d 779, 781 (D.C.Cir. 1971).

In *McGee* v. *United States,* 462 F.2d 243 (2d Cir. 1972) Chief Judge Friendly remanded for resentencing in a case where four equal concurrent sentences had been imposed

and one count was reversed on appeal. Relying on *United States* v. *Tucker*, 404 U.S. 443 (1972), the court stated (462 F.2d at 245):

> "We believe that this case presents a problem not without some analogy. We deal here with a conviction on four counts which were prosecuted in one trial and upon which identical concurrent sentences were simultaneously imposed. However, the conviction under one of those counts has now been determined to have been unlawful. The trial judge's original sentencing determination with respect to counts 2 through 4 could have been influenced by appellant's conviction under count 1—just as evidence of a prior conviction might influence a sentencing judge on a subsequent one. If such were in fact the case, appellant's initial sentences under counts 2 through 4 would require reconsideration."

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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July 31, 1973

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 SEPTEMBER SESSION, 1972

Nos. 72-1005, 72-1167, 72-1159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRIS CARDI and VIRGIL CIMMINO,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 220

BERNARD M. DECKER, *Judge.*

ARGUED NOVEMBER 1, 1972—DECIDED APRIL 16, 1973

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and PELL, *Circuit Judge.*

SWYGERT, *Chief Judge.* Appellants Cardi and Cimmino appeal their convictions of conspiracy to conceal, buy and sell narcotic drugs known to have been unlawfully

imported and of three substantive counts charging the unlawful sale of such drugs.[1] Although separate appeals were filed by each defendant, on motion of the Government they were consolidated for purposes of oral argument and will be treated together for purposes of this opinion.

The Government's evidence consisted primarily of testimony by two witnesses, Paul Moore, a law school student and paid informer for the Bureau of Narcotics, and Federal Narcotics Agent Saul Weinstein. According to their testimony, Moore and Weinstein conceived the idea that they might infiltrate certain groups which they believed to be dealing in the Chicago area narcotics traffic by posing as partners trying to establish a narcotics business in the various college communities. Pursuant to that plan on September 13, 1970 Moore asked Micelli, a fellow employee at a restaurant where Moore worked part-time, if Micelli could provide a source for the sale of hard drugs to Moore and an unnamed partner who wanted to get in the campus drug business. Micelli referred Moore to his nephew, Virgil Cimmino, who he said could take care of him.

Subsequently on September 14, 1970 Moore went to Chris Cardi's house where he explained his plans to Cimmino and requested that Cimmino get certain prices on heroin

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[1] Appellants Cardi and Cimmino, together with a codefendant, Frank Micelli, were charged in a seven count indictment which, in addition to the conspiracy and substantive counts mentioned above, contained three counts charging sales of narcotics without the required order form in violation of 26 U.S.C. § 4705(a). Appellant Cardi was acquitted of the section 4705(a) counts, but was found guilty on the conspiracy count and the three substantive counts charging individual sales. Cimmino was convicted on all seven counts including the conspiracy, substantive sales, and section 4705(a) transactions, Micelli was found not guilty of all counts.

and cocaine from his sources. A meeting between Cimmino, Moore and Weinstein was set for September 16. Cimmino failed to keep the appointment. Moore located Cimmino at Cardi's home on September 19 and asked him why he had not met them. Cimmino responded by saying that his sources had been out of town. Another meeting was arranged for the following evening. Weinstein failed to make that meeting, and Moore and Cimmino arranged another for the following evening. Cimmino again failed to appear and this time both Moore and Weinstein went to Cardi's house to find Cimmino. When they arrived they found Cimmino and Cardi standing beside Cimmino's car talking together. Moore introduced Weinstein to Cimmino and the three discussed the plan to enter the narcotics business with Cimmino as the supplier. During this conversation, Cardi was leaning against Cimmino's car and also walking on the lawn. There is no evidence, however, that he took part in the discussion.

Moore and Weinstein next met Cimmino in Elmwood Park, Illinois, where Cimmino gave them a bag which he said contained four ounces of heroin. In exchange Moore gave him $4400. Upon testing the substance at a later time, Weinstein discovered that it was flour instead of heroin. Moore and Weinstein immediately began searching for Cimmino, but were unable to locate him. The next day they drove to Cardi's house where Moore told Cardi about the bogus sale. Moore and Weinstein both testified that Cardi responded, "If it was anybody but you, I wouldn't talk about the stuff. But I will check into it and do whatever can be done. . . . You'll get it."

Two hours later Cimmino reached Moore by phone, saying: "Are you trying to get me killed? . . . You're going to get your stuff. Dickie [Cardi's nickname] is on my back.

He slapped me around and I lost my job collecting. I had five or six stops and I was making $150 a week." Weinstein demanded that Cimmino produce real heroin or return the money. The next day Cimmino met Moore and Weinstein and gave them four ounces of heroin. This sale was the basis of Count III of the indictment.

On September 30 Cimmino agreed to procure an additional eight ounces of heroin for Moore. The following day, October 1, he delivered a sock containing the heroin to Moore and Weinstein at a restaurant in Chicago. Moore paid Cimmino $8800 for the heroin and asked Cimmino to arrange for a further sale of eight ounces of cocaine for $8000. This order was confirmed by a telephone conversation between Cimmino and Moore on October 13. The delivery was made on October 15 when Cimmino delivered the drugs in a black sock and received the $8000. The October 1 sale was charged in Count V of the indictment and the October 15 sale in Count VII. Both Cardi and Cimmino were found guilty of Counts III, V and VII.

Although the October 15 sale was the last actual sale, Moore and Cimmino continued to have telephone conversations concerning possible future sales. Moore's attempt to arrange a meeting with Cimmino's source was unsuccessful, but he did manage to tape a phone conversation in which Cimmino made numerous references to Cardi. Over the defendants' objection, that recording was played for the jury and they were given written copies to follow while it was being played.[2]

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[2] The pertinent parts of that conversation are:

Cimmino: Yea, ya know I told, I told Dick.

Moore: Ya.

Cimmino: I told him that you checked it out and everything.

Moore: Ya.

Cimmino: I told him I said, I called Paul and he checked

(footnote continued)

it out. I said, he says, ya know, wa how does he know its IRS; ya know what I mean? I says he checked it out!

Moore: Ya.

Cimmino: Ya know.

* * * *

Moore: It's not IRS, its ah, IRS is federal.

Cimmino: Ya that the little FBI ah?

Moore: Na its a, the little FBI is the IBI, the state.

Cimmino: But this guy is internal revenue he's gotta be watchin ah my uncle, right?

Moore: Ya it looks like he's.

Cimmino: I'm right here, that why I'm talking like this. I'm on Grand and Harlem.

Moore: Oh, yea?

Cimmino: Yea.

Moore: Oh, I thought you were in that tavern.

* * * *

Cimmino: He ain't just going to come up with a big one and say, "Well, here, here's for your guys." Because it is I don't know. If he wants it tell him I'll give it to him for nine, it amounts to the same fucking price.

Moore: Yeah, he's a little afraid of the other guy too, I don't think he'll deal with ya anymore. But I'm going to try to find him. I saw him.

Cimmino: What other guy? Don't even mention it on the phone. The guy that you approached.

Moore: No, D.C.

Cimmino: Yeah, but what makes him afraid of this other guy? You should tell him I'm not with him.

Moore: I told him, but he says that guy controls Virgil and he doesn't want to be dealing with that stuff, and we're going to get in trouble with him.

Cimmino: He don't have to know a mother fucking thing. He don't have to know nothing, just tell him I'm not with the guy, that's all. I'm on my own tell him that's the only fucking thing you can tell him.

Moore: What do I do when he calls me?

Cimmino: What do you mean when he calls you?

Moore: When Dick calls me. He says, "What is he doing with you, who are you?"

(footnote continued)

Cimmino: Well, he knows that I go to the Bear and talk to you, what the fuck that's no problem. He knows that I'm out with somebody else fucking around do you understand what I'm talking about?

Moore: Yeah.

Cimmino: I mean, he knows where I'm running with the guys from 26th Street. What the fuck you know what I mean, he knows what I'm doing. Yeah I gotta be here because I got a little money on me, are you nuts or what? He don't know what I got every time he sees me I'm broke, do you understand?

Moore: Yeah, yeah.

Cimmino: He gives me money, do you understand that? What the fuck he don't know what I'm doing. The only reason why he says that is because of the fucking uncle. Do you understand? He made a crack, you know my uncle, he makes a big thing out of things, and this is what happened. Do you what he told me right to my face? He says, if you want to do it go ahead you'll make a ton of money. But you know what he said?

Moore: What?

Cimmino: He says I can't afford the heat around me. You understand that? He says I can't afford no heat like that around me. . . . He says I got enough, this is the truth now. He says you ought to go do it he says you'd make a ton of fucking money.

Moore: Well then he did tell you to do it.

Cimmino: Yeah, he says go ahead, but you can't come around me too much he says because, now this is between us Paul.

Moore: Yeah, I would never tell anybody that Dickie told you to do it.

Cimmino: This is between us.

Moore: Yeah.

Cimmino: He says go ahead make yourself a ton of money. But he says I can't afford that kind of heat on me. You know.

Moore: Yeah.

* * * *

The remaining Government evidence consisted of testimony by two narcotics agents that on November 25 they observed Cimmino and Micelli drive to Cardi's house and go inside. Shortly thereafter Cardi and Cimmino left the house and returned half an hour later accompanied by Micelli. The three defendants remained in the house for approximately thirty minutes before Cimmino and Micelli left and drove home.

Cimmino, testifying in his own behalf, related a different version of the facts. Cardi, who did not testify, relies heavily on Cimmino's testimony. According to Cimmino, the plan to sell narcotics was conceived by Moore and forced upon him. Cimmino stated that he owed Moore money and that he had feared Moore because he believed that Moore had been responsible for a gunshot wound he had received from a passing car in 1968. Nevertheless, Cimmino admitted that in 1970 he had been spending considerable time with Moore on a social basis. It was during

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(footnote continued)

Moore: Yea, well, I'm going to try to find the Jew I'm going to tell him first of all, that as far as Dickie is concerned, there's no heat from him. He don't care that you do it or not. He told you to go ahead and do it.

Cimmino: Right, but he just don't want me, you know.

Moore: To be around him when you do it.

Cimmino: Right.

Moore: OK, ah, this will relieve a lot of his tension, you call me tomorrow, or see me tonight.

Cimmino: Can I ask you one thing, this don't make sense.

Moore: Yea.

Cimmino: If you tell this guy that Dick continued what I'm doing and there ain't nothing said, what's the difference if he deals with me? Does that make sense? What the fuck does he have to meet my guy, you understand? My guy says what the fuck does he gotta meet me for when I got you.

this time, according to Cimmino, Moore proposed that they "screw" a rich person that he knew. Moore suggested that they do this by selling him flour instead of heroin. Cimmino told Moore that he wanted no part of it and he intentionally failed to show up for several meetings which Moore arranged. Under mounting pressure from Moore, Cimmino finally agreed and did in fact give Weinstein four ounces of flour in exchange for $4400 which he was to split with Moore. Cimmino stated that he was puzzled when Moore and Weinstein came looking for him and that he tried to call Moore to find out what was wrong. When Cimmino finally reached Moore, after Moore and Weinstein had talked to Cardi, Moore gave the phone to Weinstein who threatened to kill Cimmino if he failed to deliver the real heroin. Cimmino testified that he later called Moore and complained to him about Weinstein's threat and that Moore apologized, but said that the phony heroin deal hadn't worked, and that he should produce real heroin. Cimmino admitted that, out of fear for his life and the lives of his family, he had sold heroin to Moore and Weinstein.

I

Cimmino, who was convicted on all seven counts of the indictment, raises two questions in his appeal. The defense of entrapment as a matter of law was urged upon the trial court and is reasserted here. Cimmino also argues that he was sentenced under the wrong statute. Because appellant Cardi raises the same issue, we reserve the sentencing question for discussion at the end of this opinion.

Concerning the entrapment defense, we hold that the trial judge properly submitted the question to the jury. The Supreme Court ruled in *Sherman* v. *United States*, 356 U.S. 369 (1958), that where the evidence of entrapment is controverted "the issue of whether a defendant has

been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Sherman,* 356 U.S. at 377.

Cimmino argues that although the "issue of entrapment is generally a question of fact for the jury," the evidence in this case was of such a nature as to require a court determination that Cimmino was entrapped as a matter of law. Relying on *Sherman,* where the Supreme Court did find the entrapment as a matter of law existed, Cimmino argues that it was error to give the issue to the jury. We do not agree.

In *Sorrells* v. *United States,* 287 U.S. 435 (1932), the Supreme Court drew the crucial distinction in entrapment cases between ensnaring an innocent citizen in a government conceived and instigated plan for the perpetration of an illegal act and "merely afford[ing] opportunities and facilities" for the criminally predisposed to act. *Sorrells,* 287 U.S. at 441. See also *United States* v. *Haden,* 397 F.2d 460, 466 (7th Cir. 1968). Predisposition is the determinative factor where, as here, it is conceded by the Government that the criminal scheme originated with its agents. As is often the case, proof relative to the predisposition question was contradictory and in the final analysis reduced itself to a question of witness credibility. That in turn must be weighed and resolved by the jury.

Appellant's reliance on *Sherman* for the proposition that the trial court committed error in not finding entrapment as a matter of law is clearly misplaced. The Court carefully pointed out in *Sherman*:

> In so holding, we are not choosing between conflicting witnesses, nor judging credibility. . . . We reach our conclusion from the undisputed testimony of the prosecution's witnesses. *Sherman,* 356 U.S. at 373.

Therein lies the difference between this case and *Sherman*, for here the evidence that Cimmino readily agreed to engage in the criminal enterprise and later sought to increase its volume was sufficient to justify giving the case to the jury. The fact that Cimmino's testimony disputed the Government's evidence of willingness or predisposition merely makes it a credibility question.

II

Appellant Cardi urges numerous grounds for reversal. First, he contends that the only evidence which connects him with Cimmino in the alleged conspiracy is the September 23, 1970 conversation in which Moore related how Cimmino had "burned" them with flour instead of heroin. It is contended that Cardi's response, "If it was anybody but you, I wouldn't talk to you about the stuff. But I will check into it and do whatever can be done. You'll get it," was not sufficient to support a finding that Cardi knowingly and willfully joined a conspiracy to violate the narcotics laws. We think differently.

In resolving the question we must determine whether all the evidence when viewed in the light most favorable to the Government and considering the jury's right to weigh the evidence, determine credibility, and draw justifiable inferences, could fairly support a verdict of guilt beyond a reasonable doubt. Applying this standard, we find sufficient evidence in the record upon which the jury could reasonably have inferred a conspiracy between Cardi and Cimmino. Both Government agents testified that during their September 23 conversation with Cardi, in which they complained about the flour Cimmino had given them instead of heroin, they told him of their dealings with Cimmino and that he responded:

I said, "Dickie, I want to talk to you about Virgil." He said, "Sure, what is it?" I said, "Well, you know we are doing business with him buying stuff." He said, "Stuff?" I said, "Yes, heroin. He burned us. He gave us four ounces of flour or something and took $4,400 last night for it."

Q. Did he respond to that?

A. Yes, sir. Cardi said, "If it was anybody but you, I wouldn't talk to you about the stuff." He said, "But I will check into it and do whatever can be done." I said, "Thanks, I really need the stuff." He said, "You'll get it." I left. . . .

Immediately following this conversation, Cimmino phoned Moore and Weinstein and told them "you're going to get your stuff, Dickie is on my back." The heroin was in fact delivered shortly thereafter.

Such evidence also satisfied the requirement that the government prove an individual defendant's participation in an unlawful conspiracy by his own words and actions and not those of other participants. *United States* v. *Fellabaum,* 408 F.2d 220, 226 (7th Cir. 1969); *United States* v. *Corallo,* 413 F.2d 1306, 1324 (2d Cir. 1969). We noted in *United States* v. *Hickey,* 360 F.2d 127, 138 (7th Cir. 1966), "A conspirator need not participate in all the activities of the conspiracy, nor is it necessary that he become a member of the conspiracy at its inception . . . it is only necessary that he knowingly contribute his efforts in furtherance of it." The evidence was, therefore, legally sufficient, if believed by the jury, to support a finding of guilty on the conspiracy count.

In so holding we expressly reject the argument that it was improper to infer Cardi's participation in a conspiracy from the single transaction proved here. Citing *United States* v. *Stromberg,* 268 F.2d 256, 267 (2d Cir. 1959), and

United States v. *Reina*, 242 F.2d 302 (2d Cir. 1957), Cardi argues that the single isolated transaction whereby he facilitated the first sale is insufficient to justify the inference of participation in a conspiracy. *Stromberg* and *Reina* both reversed conspiracy convictions where the defendant's involvement with an established conspiracy was limited to a single transaction. Superficially these cases would seem to control here; they are, however, distinctly different. In both cases, the evidence failed to establish that the defendants who engaged in a single illegal transaction with an established conspiracy "knew or accepted the conspiratorial aims." That is not the situation here where the testimony of both agents indicates that Cardi was told about the narcotics transactions among Cimmino, Moore and Weinstein and voluntarily offered to intervene and facilitate one such transaction. It is Cardi's knowledge of the transaction between Moore and Cimmino and his willingness to facilitate it that distinguishes this case from *Stromberg* and *Reina*. A single act may be sufficient "to draw a defendant within the ambit of a conspiracy" where the act is such "that one may infer from it such an intent (to participate in an unlawful enterprise) or the Government submit[s] independent evidence that the defendant knew of the conspiracy and associated himself with it." *United States* v. *Bentvena*, 319 F.2d 916, 927-28 (2d Cir. 1963); *Ingram* v. *United States*, 360 U.S. 672, 680 (1959); *United States* v. *Aviles*, 274 F.2d 179, 189 (2d Cir. 1960).

Further, it is not necessary that a defendant have knowledge of each and every detail of a plan or conspiracy; it is enough when he knows its essential nature. *United States* v. *Fellabaum*, 408 F.2d at 224. The jury could legitimately infer from Cardi's statement that he knew of

the plan between Cimmino, Moore and Weinstein to sell narcotics and voluntarily assisted and facilitated its accomplishment to the extent of the September 25 sale.

III.

With respect to Count III, charging the unlawful sale of narcotics on September 25, 1970, Cardi argues in the alternative that it was error to permit various hearsay declarations by Cardi and his coconspirators to be used against defendant Cardi, and that, even if admissible, the evidence was insufficient to establish guilt beyond a reasonable doubt. We disagree with both contentions.

Our holding that the evidence established a prima facie conspiracy in which Cardi knowingly partook, at least so far as the September 25 sale charged in Count III is concerned, disposes of appellant's arguments relating to the admissibility of Cardi's own statement and the Cimmino-Moore phone conversation. Once the conspiracy was established these statements were properly received against Cardi. *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949).

As to Cardi's challenge to the sufficiency of the evidence relating to Count III, we find that his statement to Moore that he would check into Cimmino's deception and that Moore would get his "stuff," coupled with Cimmino's uncontradicted statement that "Dickie is on my back," and the fact that Cimmino immediately thereafter delivered the heroin is sufficient evidence to support a conviction for the substantive offense.

IV.

Counts V and VII charge Cardi with substantive violations of 21 U.S.C. § 174 for the October 1 and 15 heroin sales. Cardi challenges the sufficiency of the evidence supporting his conviction on these counts asserting that even

if the hearsay declarations discussed above were properly admitted there was no evidence to connect him with the sales. We agree.

As we have noted above, Cardi's participation in the conspiracy to sell drugs was established only so far as the September 25 sale was concerned. The conspiracy, so far as Cardi was concerned, ended at that time. The evidence of the conspiracy could not properly be used to support a conviction on the later sales. In addition, none of the evidence relating to the October 1 and 15 sales implicated Cardi in any manner. The Government's proof established that Cimmino and Moore arranged for these sales and that Cimmino's source was a man named Carioscia, not Cardi. The record is barren of any evidence showing that Cardi participated in or facilitated these sales as he did the September 25 sale. Indeed, there is no evidence that Cardi even had knowledge of these sales. The Government's attempt to prove Cardi's participation and knowledge by the recorded telephone conversation between Cimmino and Moore (footnote 2) is unconvincing. A fair reading of that confusing statement renders it more exculpatory than inculpatory so far as Cardi is concerned. It would appear from Cimmino's statements that Cardi, while not objecting to Cimmino's involvement with drugs, did not want to be associated with it. The only other evidence which conceivably could have been used to support conviction on these counts is testimony by Government surveillance agents that Cimmino and Micelli visited Cardi at his home on November 25, 1970. Such evidence, without some fact upon which the jury could legitimately infer that the sales in question were discussed, is completely insufficient to justify the guilty verdict. Accordingly, we hold that the trial judge erred in not directing a verdict of acquittal on Counts V and VII.

Cardi contends that the indictment charging both conspiracy and substantive offenses based upon the same evidence represented an abuse of prosecutorial discretion because it was intended to impress the jury with multiple charges. While we agree that in certain instances multiple charges based upon the same conduct may be prejudicial to a defendant's right to a fair trial, we do not believe such was the case here. It was proper for the Government to charge Cardi with conspiracy while at the same time charging him with substantive crimes arising out of the overt acts. The substantive offenses did not merge into the conspiracy, *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946), and the number and nature of the charges here cannot be said to have been designed to overwhelm the jury.

V.

Both Cardi and Cimmino were convicted and sentenced under 21 U.S.C. § 174 and 26 U.S.C. § 7237. Cardi was sentenced on October 29, 1971 to serve a total of ten years in prison: five years on the conspiracy count and, consecutive thereto, three concurrent five year sentences on each of the substantive counts. Cimmino was sentenced on the same day to a similar sentence with his six five year sentences on the substantive counts to run concurrently but consecutively to the sentence on the conspiracy count. Under 26 U.S.C. § 7237(d) neither appellant was eligible for suspension of sentence, probation, or parole.

In October 1970 Congress repealed sections 174 and 7237(d) and replaced them with the Comprehensive Drug Abuse Prevention and Control Act of 1970. This Act, which took effect six months before appellants' trial, contains no provision for a mandatory minimum sentence or exemption from the suspension of sentence, parole and probation provisions of 18 U.S.C. § 4208 as did section 7237(d).

Relying on the new provisions both Cardi and Cimmino filed motions to be resentenced under the new Act. The motions were denied and appeals were taken. Those appeals have been consolidated with the appeals from the original convictions and are therefore considered here.

It is appellants' contention that neither the "savings clause" of the new Act, section 1103(a) nor the general "savings clause" of the Federal Statutes, 1 U.S.C. § 109, mandate sentencing under the old Act because they refer only to "prosecutions" for violations occurring prior to the effective date of the new Act.[3] It is their theory that the word "prosecutions" refers only to the proceedings up to and including the verdict and judgment thereon. Sentencing would, therefore, be outside the savings clause allowing defendant charged under the old Act but not sentenced until after the adoption of the new to be sentenced under the new Act.

At the time the parties filed their briefs in this appeal, a conflict existed between this circuit and the First Circuit as to the availability of suspended sentences, paroles or probations under section 4208. This court held in *United States* v. *McGarr*, 461 F.2d 1 (7th Cir. 1972), that although the penalty provisions of the old Act requiring a five-year minimum sentence was "saved," the prohibition against

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[3] The "savings" clauses involved provide: *Public Law 91-513*, § 1103, "for any violation of law occurring prior to the effective date of Section 1101 shall not be affected by the repeals or amendments made by such section . . . or abated by reasons thereof;" *1 U.S.C.* § *109*, "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . ."

suspended sentences, parole and probation was not. The First Circuit took the opposite position in *Bradley* v. *United States,* 455 F.2d 1181 (1st Cir. 1971). The Supreme Court granted certiorari in *Bradley* and has recently resolved the question of the availability of the sentencing alternatives of section 4208 adversely to appellants. *Bradley* v. *United States,* ..... U.S. ..... slip op. No. 71-1304 (March 5, 1973).

In *Bradley,* the Court held:

> Section 1103(a) clearly makes parole unavailable under the latter provision. [18 U.S.C. § 4208(a).] As we have said, sentencing is part of the prosecution. The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971. And Congress specifically provided that § 4208(a) does not apply to any offense "for which there is provided a mandatory penalty." Pub. L. 85-752, § 7, 72 Stat. 847 (1958). In any event, the decision to make early parole available under § 4208(a) must be made "[u]pon entering a judgment of conviction," which occurs before the prosecution has ended. Section 1103(a) thus means that the District Judge cannot specify at the time of sentencing that the offender may be eligible for early parole.

We therefore reject appellants' contention that they were improperly sentenced.

For the reasons stated, the convictions of appellant Cimmino are affirmed on all counts. As to appellant Cardi, they are affirmed on Counts I and III and reversed on Counts V and VII.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Excerpt from transcript of October 29, 1971

Sentencing Hearing.

• • •

Mr. Fitzsimmons: Your Honor, in light of the evidence, I don't propose to review it for the Court, but I am somewhat surprised at Mr. Jenner's remark that Mr. Cardi's involvement in this case is not as great as Mr. Cimmino's.

I think the evidence reflects that Mr. Cardi is the focal point of this case, and his involvement is far greater than Mr. Cimmino's, because without Mr. Cardi, nothing in this case would have been done.

Mr. Cardi consistently, throughout the course of this case, the evidence shows from the time he came into it, until the time the indictment brought it to an end in November, consistently exercised an influence over Mr. Cimmino; that influence was demonstrated at the outset, in September, and Cimmino, scared, not of the agent, scared, not of the Government, but scared of "Dickie," and it continued to go right on through to the telephone conversation, which the Court heard in the tape from November, where it was clear from Mr. Cimmino's comments, the influence that Mr. Cardi continued to exercise over Mr. Cimmino, directing his activities with respect to this, although by that time Mr. Cimmino had established considerable direction of his own.

While I am sympathetic with Mr. Cardi's personal family life, the business that he engaged in with respect to dealing in heroin, I am sure the Court is aware of the effect that that has on the family lives of other citizens of the community, particularly in respect to this case where there was never, at any time, any representation, other than this heroin was being used for sale on college campuses.

Mr. Cardi's total disregard and lack of concern for the community is something which I think bordered on scandalous, and for that reason, we urge the Court to consider all of those factors when weighing the sentence of Mr. Cardi.

The Court: Certainly, there was enough evidence produced at this trial to convince the jury that Mr. Cardi was involved, and, as the evidence certainly indicated that he was more involved, as counsel for the Government has described as the focal point of whatever went on here, than any one of the persons that were charged in this indictment. The operation couldn't have gone on without him.

So far as the defendant Cardi is concerned, he will be sentenced to the custody of the Attorney General, or his authorized representative for imprisonment for a period of five years on Count I, a similar period of five years on Counts III, V, and VII, those sentences to run concurrently, one with the other, but consecutive to the sentence on Count I, a total of ten years.

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No. 73-214

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In the Supreme Court of the United States

OCTOBER TERM, 1973

CHRIS CARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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CHRIS CARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count alleging a conspiracy from September 1970 to February 1971 to conceal, buy, and sell narcotics known to have been unlawfully imported, and on three substantive counts alleging unlawful sales of such drugs in violation of 21 U.S.C. (1964 ed.) 174, one in September and two in October 1970.[1] He was sentenced to five years' imprisonment on the conspiracy count and to concurrent five year sentences on each of the three substantive counts, the latter sentences to run consecutively to the sentence on the conspiracy count.

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[1]Co-defendant Virgil Cimmino, who was also convicted of violation of the narcotics laws, unsuccessfully sought review by this Court on grounds different from those raised in the instant petition. *Cimmino* v. *United States*, No. 72-6972, certiorari denied, October 9, 1973.

The court of appeals affirmed the conspiracy conviction and one of the substantive convictions but reversed as to the other two substantive counts (Pet. App. 1-17).

Petitioner contends that it was error to admit hearsay declarations by other co-conspirators made after petitioner's participation in the conspiracy had allegedly ended, and that he was sentenced in violation of *United States* v. *Tucker*, 404 U.S. 443.

The facts set forth in the opinion below are not in dispute.

> The Government's evidence consisted primarily of testimony by two witnesses, Paul Moore, a law school student and paid informer for the Bureau of Narcotics, and Federal Narcotics Agent Saul Weinstein. According to their testimony, Moore and Weinstein conceived the idea that they might infiltrate certain groups which they believed to be dealing in the Chicago area narcotics traffic by posing as partners trying to establish a narcotics business in the various college communities. Pursuant to that plan on September 13, 1970 Moore asked Micelli, a fellow employee at a restaurant where Moore worked part-time, if Micelli could provide a source for the sale of hard drugs to Moore and an unnamed partner who wanted to get in the campus drug business. Micelli referred Moore to his nephew, Virgil Cimmino, who he said could take care of him.
>
> Subsequently on September 14, 1970 Moore went to Chris Cardi's house where he explained his plans to Cimmino and requested that Cimmino get certain prices on heroin and cocaine from his sources. A meeting between Cimmino, More and Weinstein was set for September 16. Cimmino failed to keep the ap-

> pointment. Moore located Cimmino at Cardi's home on September 19 and asked him why he had not met them. Cimmino responded by saying that his sources had been out of town. Another meeting was arranged for the following evening. Weinstein failed to make that meeting, and Moore and Cimmino arranged another for the following evening. Cimmino again failed to appear and this time both Moore and Weinstein went to Cardi's house to find Cimmino. When they arrived they found Cimmino and Cardi standing beside Cimmino's car talking together. Moore introduced Weinstein to Cimmino and the three discussed the plan to enter the narcotics business with Cimmino as the supplier. During this conversation, Cardi was leaning against Cimmino's car and also walking on the lawn. There is no evidence, however, that he took part in the discussion.
>
> Moore and Weinstein next met Cimmino in Elmwood Park, Illinois, where Cimmino gave them a bag which he said contained four ounces of heroin. In exchange Moore gave him $4,400. Upon testing the substance at a later time, Weinstein discovered that it was flour instead of heroin. Moore and Weinstein immediately began searching for Cimmino, but were unable to locate him. The next day they drove to Cardi's house * * *. [Pet. App. 2-3.]

Moore told petitioner he wanted to talk about Cimmino and said "Well, you know we are doing business with him buying stuff, * * * heroin," and that "[h]e burned us. He gave us four ounces of flour or something and took $4,400 last night for it." Petitioner responded, "If it was anybody but you, I wouldn't talk to you about the stuff. But I will check into it and do whatever can be done. * * * You'll get it" (Pet. App. 11).

> Two hours later Cimmino reached Moore by phone, saying: "Are you trying to get me killed? * * * You're going to get your stuff. Dickie [Cardi's nickname] is on my back. He slapped me around and I lost my job collecting. I had five or six stops and I was making $150 a week." Weinstein demanded that Cimmino produce real heroin or return the money. The next day Cimmino met Moore and Weinstein and gave them four ounces of heroin.[Pet. App. 3-4.]

The government presented evidence of two additional sales of narcotics by Cimmino to the government agents, one on October 1, 1970, and a second on October 15, 1970.[2] On November 28, 1970, three days after a meeting of petitioner, Cimmino and Micelli at petitioner's home (Pet. App. 7), Moore tape-recorded a telephone conversation initiated by Cimmino which contained various references to "D.C." and "Dickie" (apparently petitioner) and which also referred to Cimmino's and Moore's involvement in narcotics transactions.[3] Cimmino and Moore both testified at the trial and were cross-examined by petitioner.

1. The petition does not challenge the sufficiency of the evidence to support the conspiracy conviction or the substantive conviction based on the September 25 sale, nor does it in fact raise any constitutional

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[2]Petitioner's convictions on the substantive counts for these two sales were reversed on appeal due to insufficient evidence that he was involved in the sales.

[3]The recording is set forth in pertinent part in the opinion below (Pet. App. 4, n. 2).

question.[4] Rather, petitioner claims that the tape-recorded conversation was technically hearsay erroneously admitted against him, so that both convictions should be reversed, despite the facts that (1) both parties to the taped conversation testified and were cross-examined by petitioner, (2) no suggestion is made that the tape or the statements on it were inaccurate, and (3) petitioner does not contend that the taped conversation incriminated him (Pet. 12).

Admission of the tape was not contrary to *Lutwak* v. *United States,* 344 U.S. 604, 618; *Krulewitch* v. *United States,* 336 U.S. 440, 444; and *Fiswick* v. *United States,* 329 U.S. 211, 217, which hold that out-of-court hearsay declarations made by one co-conspirator after the termination of a conspiracy and not in furtherance of its objectives are not admissible against other co-conspirators. Here, the conspiracy to sell narcotics had been established; it had not been terminated; and the conversation was plainly in furtherance of the objectives of the agreement, *i.e.,* the sale of narcotics. Moreover, the only evidence indicating that petitioner had withdrawn from the conspiracy

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[4]Although petitioner asserts that the admission of the tape violated his Sixth Amendment right to confrontation (Pet. 2, 8, 10), it is clear that the petition raises, at best, only a question concerning non-constitutional rules of evidence, because both parties to the taped conversation testified at the trial and were cross-examined by petitioner. Compare *Nelson* v. *O'Neil,* 402 U.S. 622.

[5]The statement of the court of appeals (Pet. App. 14) that so far as petitioner was concerned the conspiracy ended on September 25, 1970, was directed at the question of his liability under the substantive counts based on later transactions in which he was not shown to be directly involved. That statement does not indicate that the court concluded that petitioner had so withdrawn from the conspiracy as to avoid any responsibility for the acts and declarations of his confederates, nor that they had known from the outset that his participation would be limited to a single transaction.

was the tape-recorded statement of Cimmino to the effect that, while petitioner did not object to Cimmino's sales, he did not want to appear to be associated with them (Pet. App. 14). Since both a conspiracy and petitioner's participation in it were established, the burden was on petitioner affirmatively to show his withdrawal.[5] *Hyde* v. *United States*, 225 U.S. 347, 369-370; *United States* v. *Chester*, 407 F. 2d 53, 55 (C.A. 3), certiorari denied, 394 U.S. 1020; *United States* v. *Goldberg*, 401 F. 2d 644, 648 (C.A. 2), certiorari denied, 393 U.S. 1099. As no such showing was made, the recorded statements were admissible against petitioner as a member of the ongoing conspiracy.[6]

Even if the admission of the recording was technically erroneous, it was not so prejudicial as to require reversal. In large part the tape exculpated petitioner.[7] He does not contend that the balance of the statements were inculpatory as such (Pet. 12). Rather, they dealt with matters that had already been attested to by government witnesses on direct examination

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[6]Moreover, even if petitioner had ceased to participate in the conspiracy prior to the recorded conversation on November 28, 1970, such withdrawal would not have been legally effective or complete until it had been communicated to the other co-conspirators, and the statements of Cimmino, as petitioner's agent in communicating his withdrawal, would have been admissible against petitioner. *United States* v. *Geaney*, 417 F. 2d 1116, 1121 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028.

[7]It was due, *inter alia*, to the exculpatory nature of the recorded statements that the court below reversed petitioner's convictions as to the substantive sales on October 1 and 15 (Pet. App. 14).

(Pet. 11), and were merely cumulative.[8] Thus, admission of the recorded conversation would have been harmless error.

2. Invoking *United States* v. *Tucker*, 404 U.S. 443, petitioner contends that he should be resentenced because the substantive convictions reversed on appeal might have influenced the sentences on the other two counts. Here, however, petitioner's sentence was not based on any unconstitutional defect,[9] nor had there been any wrongful incarceration of him which might have been taken into account by the sentencing judge, as in *Tucker*. Rather, the court considered the evidence of petitioner's role in the criminal endeavor and imposed sentence accordingly (Pet. App. 19). A resentencing is not required by *Tucker* whenever one count of a multi-count conviction is invalidated,[10] see *United States* v. *Driscoll*, 449 F. 2d 894 (C.A. 1), certiorari denied, 405 U.S. 920, and the sentencing judge may properly consider evidence introduced on counts as to which the defendant was acquitted. *United*

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[8]Petitioner's claim of prejudice comes down to the assertions (1) that evidence of petitioner's words consisted entirely of the government agents' testimony that he said "you'll get it" (Pet. 11), which comment was in petitioner's view "suspiciously absent" from the agents' prior written reports (Pet. 7), and (2) that the tape served to corroborate the testimony of the agents. In fact, the words "you'll get it" added little to petitioner's statement—also testified to by the agents without challenge and included in their reports—upon hearing of Cimmino's delivery of flour instead of heroin, that "I will check into it and do whatever can be done about the stuff [*i.e.*, heroin]" (Pet. App. 3), and the fact that the next day Cimmino delivered the heroin to the agents.

[9]See note 4, *supra*, p. 5.

[10]Significantly, in his petition for rehearing, which the court of appeals denied, petitioner did not contend that the resentencing he sought was required by *Tucker*.

States v. *Sweig*, 454 F. 2d 181, 184 (C.A. 2). Moreover, since petitioner received concurrent sentences on each of the three substantive counts, reversal as to two of the counts does not require resentencing.[11]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[11]Petitioner's reliance on *McGee* v. *United States*, 462 F. 2d 243 (C.A. 2), is misplaced for there a divided court of appeals reversed a denial of a motion to reduce sentence under Rule 35, Fed. R. Crim. P., and remanded for reconsideration, only on proof that the remaining charges for violations of the Selective Service laws would as a matter of policy probably not have been prosecuted absent the charge of failure to submit to induction on which a conviction was reversed. No such governmental policy is present here. This case is rather more like those described in *McGee* where resentencing would typically not be required, *e.g.*, conspiracy count conviction affirmed and substantive count conviction reversed. *Id.* at 246, n. 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

CHRIS CARDI,

Petitioner.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INTRODUCTION

Constitutional Questions:

The Solicitor General erroneously states that no constitutional question is presented by this petition. The petition and record demonstrate denial of rights guaranteed petitioner by the Fifth and Sixth Amendments: namely, the right to a fair trial (Fifth Amendment, due process clause); before an impartial, unprejudiced jury (Sixth Amendment); the right to be confronted with the witnesses against him (Sixth Amendment) and to be sentenced, if guilty, on premises unprejudiced by improper consideration of jury verdicts and evidence with respect thereto that should never have reached the jury (Fifth and Sixth Amendments).

Alleged Guilt On Counts 1 And 3.

The Solicitor General also states that guilt under counts 1 and 3 is clear, or is tacitly conceded. Quite the contrary is true. When limited to counts 1 and 3, especially when count 1 is excised of its inclusion of counts 5 and 7 and the prejudicial evidence admitted thereunder, the case is extremely close.

Furthermore, the evidence and verdict under counts 1 and 3 were severely tainted by the failure of the learned trial judge to withdraw counts 5 and 7 from the jury and to instruct the jury to disregard, as to petitioner, all of the evidence admitted under those counts. Also, the verdicts as to counts 1 and 3 were constitutionally impermissible in light of the learned trial judge's prejudicial ruling on admission of evidence as to petitioner under counts 5 and 7 and his instructions to the jury to consider "all the evidence" (R. 709), "all the facts and circumstances surrounding the case" (R. 717), as well as "the actions and declarations of all the alleged conspirators-participants." (R. 718).

The statement of facts presented by the Government in its Answering Brief* (pp. 2-4) demonstrates the true nature of this case. One paragraph of the Solicitor General's fact statement refers to petitioner; the remainder to co-defendant Cimmino. At trial, the Government counsel, we respectfully suggest, recognized that the evidence against petitioner alone would not support a conviction. The Government needed and found a way to tie petitioner to the evidence against Cimmino. That method was to

* We note that the Solicitor General has neither complied with Supreme Court Rule 24 nor served notice on Petitioner of any enlargement of time to file his brief.

use the taped telephone conversation and other evidence erroneously admitted over objection under Counts 5 and 7 and successfully to oppose the giving of a limiting instruction both as to the taped conversation and the other evidence admitted under Counts 5 and 7.

Having presented the substance of the taped conversation to the jury three times—once through Moore's testimony, once by playing the tape for the jury, and once by giving a transcript of the tape to the jury—the Government's statement (Gov't. Brief p. 4) that the tape may not even have referred to Petitioner is patent nonsense. When the other evidence erroneously admitted against petitioner on counts 5 and 7 was added, it is clear that the jury was overwhelmed by the prejudice.

I

THE COURT OF APPEALS CLEARLY VIOLATED THE RULE OF LUTWAK V. UNITED STATES AND KRULEWITCH V. UNITED STATES.

The rule of *Lutwak* v. *United States,* 334 U.S. 604 (1953) and *Krulewitch* v. *United States,* 336 U.S. 440 (1949) is clear: admission of a post-conspiracy statement *without limiting instructions respecting its inadmissibility to a particular defendant is, ipso facto, prejudicial, reversible error.* Equally, if not more so, admission of other evidence under counts 5 and 7 which should have been excluded as to petitioner under proper instructions is likewise *ipso facto* prejudicial, reversible error.

The Government argues (Brief p. 5) that the rule of *Lutwak* and *Krulewitch* was not violated because a conspiracy had been established and had not been terminated prior to the November 28, 1970 taped telephone conversation. This argument totally disregards the holding of the Court of Appeals as to the nature and scope of the conspiracy of which petitioner was found (erroneously we contend) to be a part.

There was no evidence presented at trial connecting petitioner to a comprehensive, ongoing conspiracy to sell narcotics. Rather, the Court of Appeals found that the evidence supported a finding of a conspiracy limited to the facilitation of a single transaction:

> "The jury could legitimately infer from Cardi's statement that he knew of the plan between Cimmino, Moore and Weinstein to sell narcotics and voluntarily assisted and facilitated its accomplishment *to the ex-*

> *tent of the September 25 sale.*" (A. 12-13; emphasis added.)*

The Court also stated:

> ". . . Cardi's participation in the conspiracy to sell drugs was established only so far as the September 25 sale was concerned. The conspiracy, so far as Cardi was concerned, ended at that time." (A. 14).

Because the conspiratorial agreement of petitioner, as found by the Court of Appeals, was limited to the facilitation of a single transaction, petitioner was not required to take affirmative steps to terminate his involvement. As stated in *Hyde* v. *United States,* 225 U.S. 347 (1912), one of the cases relied upon by the Government, (Brief p. 6), a distinction must be drawn between an ongoing and a limited conspiracy (225 U.S. at 369):

> "Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous."

The court in *Hyde* held that a member of an ongoing conspiracy must take affirmative action to withdraw but indicated that a limited conspiracy is terminated as to its members when the limited objective of the conspiracy is accomplished. Furthermore, the following cases make clear that a conspiracy terminates on the date that the

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* As argued in the Petition and this Reply, the jury reached a verdict of guilt on Count 1 because of the constitutional taint of the prejudicial, reversible errors of the trial judge under Counts 5 and 7.

central objective of the conspiracy is achieved. *Lutwak* v. *United States,* 344 U.S. 604, 616-17 (1953); *Krulewitch* v. *United States,* 336 U.S. 440, 442 (1949); *Fiswich* v. *United States,* 329 U.S. 211, 216-17 (1946), *Mosley* v. *United States,* 285 F.2d 226, 228 (5th Cir. 1960) and *United States* v. *Hickey,* 360 F.2d 127, 140 (7th Cir. 1966). The central objective of the conspiracy of which petitioner was found to be a part was the facilitation of a single sale of heroin. That conspiracy terminated, as the Court of Appeals has stated, with the completion of that sale on September 25, 1970.

The Government's position (Brief p. 5n.5) that the conspiracy of which petitioner was found to be a part can be considered ongoing for purposes of establishing the conspiracy but temporary for purposes of establishing substantive liability for later transactions is unsupported by any authority or by any references to the record. The statement is sheer speculation.

As was held by the Court of Appeals, petitioner was a member of a limited conspiracy which terminated as of September 25, 1970. Accordingly, under the rule of *Lutwak* and *Krulewitch,* the statement of Cimmino, made after the termination of this alleged conspiracy, could not have been made in furtherance thereof and was inadmissible as against petitioner. The learned trial court's refusal, despite the urging of petitioner's counsel, to instruct the jury to consider the taped conversation (as well as all other evidence under counts 5 and 7) only as to Cimmino contaminated the verdict.

The only possible means of rectification is a new trial.

II.

THE ADMISSION OF THE NOVEMBER 28 CONVERSATION AND OTHER EVIDENCE UNDER COUNTS 5 AND 7 WAS REVERSIBLE ERROR.

The Government's statement (Brief pp. 6-7) that even if the admission of the November 28 statement was erroneous, the error was not so prejudicial as to require reversal and remandment for new trial, ignores the plain facts of this case.

The Government contends that the conversation was not inculpatory of petitioner and at most was simply cumulative.* Even if this statement were correct, it totally misses the point. The point is not what weight *should* have been given this improperly admitted conversation, but rather what weight *was* given to it and other erroneously admitted evidence by the jury; and the effect all that evidence had on the jury.

The weight given by the jury—not only to the tapes but also the highly prejudicial evidence on counts 5 and 7 which the Court of Appeals correctly held should have been withdrawn from the jury but to which the trial judge directed the attention of the jury and Government counsel emphasized in closing argument—is demonstrable. There simply is no other way to explain the jury's verdict of guilty on the October 1 and 15 sales (counts 5 and 7). The jury was overwhelmed, and its objectivity seriously impaired by this mass of inadmissible evidence.

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* Even if the conversation was cumulative, it was harmful to admit it in that it served improperly to corroborate prior testimony. This was the holding in *Laughlin* v. *United States*, 344 F.2d 187, 192-93 (D.C. Cir. 1965) where the Court reversed even though limiting instructions had been given.

The trial judge instructed the jury, over the objections and motions of petitioner, to consider "all the evidence" (R. 709, 710, 712, 721); "all of the facts and circumstances surrounding the case" (R. 717); as well as "the actions and declarations of all of the alleged conspirators-participants . . ." (R. 718). The trial judge submitted *all* counts to the jury with instructions that the conspiracy (count 1) embraced the period "September 1st, 1970 and continuing thereafter until on or about 24—February 24, 1971" (R. 712) and that Count 1 realleged "what is charged in the remaining counts of the indictment . . ." (R. 713). The jury was told that if it found a continuing conspiracy *as charged in count 1* then "the acts and *declarations* of any other member of such conspiracy, in or out of the defendant's presence, done in furtherance of the objects of the conspiracy *and during its existence, may be considered as evidence against such defendant.*" (R. 719; emphasis added).

There is no credible reason to believe, especially since both a limiting instruction as to the tapes and a motion for withdrawal of Counts 5 and 7 as to petitioner was refused, that the jury did not consider and was not materially influenced by the prejudicial evidence in reaching its verdict on Counts 1 and 3. The Government's belated attempt to belittle the significance of the taped telephone conversation flies in the face of its own triple introduction of the Cimmino conversation at trial; its own reliance and emphasis on the conversation during closing argument (R. 706-08) and the sentencing hearing (A. 18); the trial judge's reliance on the conversation in imposing sentence (A. 19); and the jury's demonstrable reliance in convicting on Counts 5 and 7.

The cumulative effect of submitting to the jury Counts 5 and 7, on which there was absolutely no admissible evidence as to Cardi, and allowing the members of the jury not only to hear the taped telephone conversation of November 28, 1970, but to afford them a reporter's transcript thereof, and to consider as to Counts 1 and 3, the evidence admitted as to all other Counts, gave unwarranted credence to the Government witnesses and unalterably prejudiced petitioner.

Counts 1 and 3 were seriously and prejudicially tainted by these errors thus denying defendant his constitutionally guaranteed right to a fair trial by an unprejudiced, impartial jury.

III.

PETITIONER WAS SENTENCED IN VIOLATION OF UNITED STATES v. TUCKER.

In imposing sentence, the trial judge was improperly influenced by the November 28, 1970 conversation, which was erroneously admitted, by other prejudicial and inadmissible evidence admitted against petitioner under Counts 5 and 7, and by the jury verdicts on those Counts. The learned trial judge sentenced petitioner on Counts 1, 3, 5 and 7 to the same imprisonment as he did with respect to defendant Cimmino who was found guilty of a continuing conspiracy extending into the months of October and November (Counts 5 and 7) as to which the Court of Appeals has held petitioner did not participate.

We respectfully submit that the sentences as to Petitioner were unduly harsh in light of the material difference in the involvement of Cardi and Cimmino. And, this is especially true in light of the reversal by the Court of

Appeals of counts 5 and 7 and the favorable verdicts of the jury as to Petitioner (only) on counts 2, 4, and 6 whereas Cimmino was found guilty on all seven counts.

The Government argues (Brief p. 8n.11) that petitioner's reliance on *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972) is misplaced. In *McGee*, the court relied upon *Tucker** to require resentencing in a situation where the trial court's original sentencing determination could have been influenced by defendant's conviction on a count subsequently reversed. That is precisely the situation presented by the case at bar.

The Government contends that *McGee* is distinguishable because there the reversed count was the most serious of the four counts under which *McGee* was prosecuted, whereas in the case at bar the conspiracy conviction was affirmed and two of the substantive count convictions were reversed. Furthermore, the Government contends that this case is similar to cases cited in *McGee* where resentencing is not required.

In fact, the case at bar is not akin to the case in which conviction on a substantive count has little sentencing impact upon the more serious conspiracy count. Reversal of the convictions on counts 5 and 7 has tremendous significance. The reversal was based on a finding by the

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* The Solicitor General advances the immaterial observation that we did not cite *Tucker* in our briefs and petition for rehearing in the Court of Appeals. The fact is, however, that we argued the point in the Court of Appeals in moving, in the alternative, for remandment for resentencing. (Court of Appeals brief pp. 49-59. Petition for Rehearing, pp. 16-18) The Court of Appeals denied the motion. (See Court of Appeals Order in the Record which is not presently available to petitioner's counsel.)

Court of Appeals that petitioner was involved in an extremely limited conspiracy, a conspiracy considerably different from the one considered by the trial court. As we have previously stated, the Court of Appeals determined that petitioner was part only of a conspiracy to facilitate the September 25 sale; that as to petitioner the conspiracy terminated with the accomplishment of that sale; and, that there was no evidence to support the view that petitioner even knew of the October 1 and 15 sales underlying counts 5 and 7.

It is apparent that the reversal on counts 5 and 7 stems from a recognition by the Court of Appeals that petitioner was *not* shown to be the "focal point" of an ongoing conspiracy to import and sell narcotics as stated by the trial court. (A. 18-19).

The holding of the Court of Appeals relates directly to the validity of the trial court's reliance on inferences drawn from the jury's verdict. As stated in *United States* v. *Needles*, 472 F.2d 652, 657 (1973) (quoting from *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) and citing *Tucker*):

> "material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."

The learned trial judge imposed sentence under the influence of material, unwarranted assumptions as to the nature and scope of the conspiracy in which petitioner was found to be involved. These assumptions were based not only on the erroneous premise that petitioner was involved in a conspiracy that continued beyond September 25th, but also on inferences the judge erroneously drew from all of the evidence, including the improperly considered November 28 taped conversation.

For these reasons, as well as those set forth in the petition for certiorari, the cause should be remanded for review and reconsideration of petitioner's sentence in light of the determinations of the Court of Appeals and in conformity with the rule established in Tucker.*

CONCLUSION

This is an extraordinary case. Petitioner is seeking his constitutional right to a fair trial by an impartial and unprejudiced jury. Petitioner seeks only to be tried on evidence pertinent to the limited issues presented by counts 1 and 3, uninhibited by the extraneous and inadmissible evidence introduced against him at the trial of this case. These are rights guaranteed him by the Constitution but which were denied him at trial.

Respectfully submitted,

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* This request is alternative to the major thrust of the Petition, viz., that petitioner was necessarily denied his federally protected constitutional right to a fair trial under Counts 1 and 3 before a fair and unprejudiced jury, and that therefore, the cause should be remanded for new trial as to those counts.